UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NORMA F. ROTH, Appellant, v. DEPARTMENT OF TRANSPORTATION, Agency.	DOCKET NUMBER BN07529102301 1 DATE: MAY 22 1992

William J. Lafferty, Esquire, Boston, Massachusetts, for the appellant.

James W. Whitlow, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued September 3, 1991, that dismissed her appeal for lack of jurisdiction, and moves for reconsideration of the Chief Administrative Law Judge's (CALJ) order sanctioning her for failure to comply with his discovery order.[1] For the

[1]After the close of the record on petition for review, see 5 C.F.R. § 1201.114(i), the appellant submitted a motion to dismiss the agency's response to the petition and additional argument. See Petition for Review File, Tabs 9 and 11. The Board has not considered the motion or the additional argument

reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it and the appellant's motion for reconsideration of the CALJ's sanction order. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

On June 2, 1991, the appellant resigned from her position as a GM-14 Manager, Labor Relations Branch. On June 14, the appellant filed a Board appeal, alleging that her resignation was coerced, and therefore involuntary. On July 3, agency counsel served the appellant and her counsel with a request for her deposition on July 18. The appellant objected to appearing for a deposition on July 18, and the agency served a second request for deposition, scheduling the deposition for August 22. The appellant again objected to appearing.

On August 19, the Chief Administrative Law Judge (CALJ) issued an order for the appellant to appear for the August 22 deposition. That order specified that the appellant could file objections and that, if the CALJ did not issue an amended order, the appellant was to appear at the deposition. On

---

because neither was accompanied by a showing of good cause. See 5 C.F.R. § 1201.114(f).

August 20, the appellant filed a motion for reconsideration of the August 19 order. The appellant attached an affidavit setting out her reasons for not being able to attend. Those reasons included her acting on the advice of her doctor to avoid stressful situations and her belief that the deposition was harassing because all of the information that the agency sought to obtain through the deposition was available in documents filed by the appellant, including her Equal Employment Opportunity and court complaints, and the charge she filed with the Office of Special Counsel. *See* IAF, Tab 20. The CALJ did not issue an amended order.

On August 21, the appellant's counsel informed the agency's counsel that the appellant would be unavailable for the deposition. On August 22, the agency filed a motion for sanctions because of the appellant's failure to appear at the deposition. *See* IAF, Tab 22. The CALJ gave notice to the appellant that sanctions could be imposed, *see* IAF, Tab 23, and subsequently issued an order in which he found that the imposition of sanctions on the appellant was necessary to serve the ends of justice. He found that the appellant's failure to comply with his order had not been adequately explained or justified and that the agency was prejudiced in its case preparation by her failure to appear. *See* IAF, Tab 25. He sanctioned the appellant by drawing an inference that all of the appellant's claims of involuntariness were lacking

in support. *See id.* He cancelled the hearing because no basis for Board jurisdiction remained. *See id.*

The CALJ then issued an initial decision dismissing the appeal for lack of jurisdiction. He found that, because of the sanction he had imposed, the appellant failed to carry her burden of showing that her resignation was involuntary. *See* IAF, Tab 27.

In her petition for review and motion for reconsideration of the sanction order, the appellant contends that the CALJ abused his discretion in imposing the extreme sanction of dismissal for her failure to obey his order to appear at the deposition[2] and asserts that the notice of deposition was defective because the agency did not proffer witness fees and expenses.

---

[2]In a submission received by the Board on December 16, 1991, the appellant contended that the Board's decision in *Moore v. Department of Health & Human Services*, 50 M.S.P.R. 201 (1991) was applicable to her appeal. In *Moore*, the Board held that sending orders to an appellant at the wrong address could affect the appellant's substantive rights. The appellant here asserts that the CALJ sent orders to her at an incorrect address. Petition for Review File, Tab 12.

The Board issued *Moore* after the close of the record on petition for review in the appellant's case, and the appellant was diligent in asserting that the case was relevant to hers, submitting her correspondence less than two weeks after the case was published. *Moore*, however, is distinguishable from the appellant's case because there is no evidence that improper mailing caused the appellant to be unable to respond to any CALJ order or otherwise contributed to the dismissal of her appeal.

ANALYSIS

The imposition of sanctions for a party's failure to comply with discovery orders is within the sound discretion of the administrative judge but should only be used when necessary to serve the ends of justice. *See Peck v. Office of Personnel Management*, 35 M.S.P.R. 175 (1987). Sanctions should be imposed only when a party has failed to exercise basic due diligence in complying with any order, or when a party has exhibited negligence or bad faith in its efforts to comply. *See id.* The Federal Rules of Civil Procedure (Fed. R. Civ. P.), although not controlling in proceedings before the Board, provide a general guide for Board discovery practices. *See Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 285 n.7 (1988). Thus, the CALJ, when ruling on the agency's motion for sanctions against the appellant for failure to appear for a deposition, properly looked to Fed. R. Civ. P. 37 (Rule 37) for guidance. *See* IAF, Tab 25 (Order regarding the agency's motion for sanctions at 2).

Rule 37 identifies sanctions available if a party fails to obey an order to provide discovery. *See* Fed. R. Civ. P. 37(b)(2). The evidentiary sanction imposed in the case at hand, drawing "an inference favorable to the agency that all of [the appellant's] claims of involuntariness of her resignation [were] lacking in support," IAF, Tab 25 (sanction order at 4), is within the sanctions available under Rule 37. Further, the Board does not prohibit the imposition of an

evidentiary sanction for a single failure to obey a discovery order. *Cf. Murdock v. Government Printing Office*, 38 M.S.P.R. 297, 299 (1988) (a single failure to comply with a Board order is insufficient to support a dismissal for failure to prosecute). Although the sanction imposed here led to dismissal for lack of Board jurisdiction, because jurisdiction could only be established by proof that the appellant's resignation was involuntary, the sanction itself was not dismissal. *See* IAF, Tab 27 (initial decision at 2).

Traditionally, courts have not allowed an imposed sanction to result in dismissal on the merits except on the clearest showing that this course was required. *See* Wright and Miller, Federal Practice and Procedure: § 2284. The reason for the party's failure to comply has been the pivotal consideration in determining what sanction to impose. *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). In the past twenty years or so, courts have taken a stricter view of sanctions for discovery violations. *See National Hockey League v. Metropolitan Hockey Club, Inc.* 427 U.S. 639 (1976). If the failure to make discovery is willful, however, a court may well order dismissal or a default judgment even though less drastic sanctions are available. *See Morgan v. Massachusetts General Hosp.*, 901 F.2d 186, 195 (1st Cir. 1990).

We find that a sanction for a single failure to obey a discovery order should allow the extreme result of dismissal in Board appeals only if the appellant's defiance of a discovery order is willful. Here, although the CALJ did not specifically find whether the appellant's actions were willful, upon examination of the record, we find that they were. "Willful" is defined as "proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental." *See* Black's Law Dictionary, 5th Edition at 1434. The appellant's failure to appear at the deposition was willful to the extent that she acted voluntarily, intentionally, and with the specific intent to disobey the order of the CALJ to attend the deposition.

The appellant had not received an amended order from the judge after she explained her reasons for objecting to his order to attend the deposition, and thus knew that she was required to attend. *See* IAF, Tab 25 (sanctions order at 2); IAF, Tab 18 (order to appear at deposition at 1). Further, the appellant did not show that incapacitation because of illness kept her from attending the deposition. In her opposition to the agency's motion for sanctions, the appellant stated that she was fearful of being subjected to a hostile deposition and she determined that she could not risk that stress and exasperation. *See* IAF, Tab 24. The appellant did not, however, present any medical evidence of incapacity or

medical consequences as a result of appearing for the deposition. As the CALJ stated, more is required than fear of stress and exasperation to establish a valid reason to evade the legal obligation to appear at the deposition. The appropriate action for the appellant would have been to attend the deposition and, if it turned unduly stressful or abusive, to seek a ruling from a judge limiting questioning or continuing the deposition. The CALJ's sanction, which resulted in dismissal of the appeal, was not, therefore, an abuse of discretion. *See Bilger v. Department of Justice*, 33 M.S.P.R. 602, 607 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table).

The appellant's argument that the notice of deposition was defective because the agency did not proffer witness fees and expenses was not articulated before the CALJ. The sole reference by the appellant to this matter below was as follows, "As to taking an adverse inference, please see *Swafford v. Tennessee Valley Authority*, 30 M.S.P.R. 130 (1986)." *See* IAF, Tab 24. Assuming without finding, that the appellant's reference to *Swafford* is effective to raise the assertion that she makes on petition for review, the Board finds that *Swafford* is not applicable to this case. In *Swafford*, the employee declined to undertake intercity travel at his own expense. The appellant in this case has never argued that her reason for failure to appear at the deposition was the expense of her travel from a suburb of Boston to the

city of Boston. Also, and more importantly, in *Swafford* the employee refused to appear at a deposition that was part of the parties' voluntary discovery. The instant case does not involve voluntary discovery; rather, this appellant was ordered to appear by the CALJ. Thus, the Board finds that the notice of deposition was not defective.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.